United Steel Service, Inc., d/b/a UNISERV *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2. Case 8–CA–32615

September 15, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 25, 2001, the General Counsel issued the complaint on August 1, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 8–RC–16150. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 31, 2001, the General Counsel filed a Motion for Summary Judgment. On September 5, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[1] We, therefore, find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We recognize that this case arises in the Sixth Circuit, which in *Van Dorn Plastic Machinery Co. v. NLRB*,[2] modified the Board's standard for campaign misrepresentations set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). We adhere to the *Midland* standard. Nevertheless, we agree with the Acting Regional Director's finding in the representation case that, even applying the *Van Dorn* standard to the facts of this case, the alleged misrepresentation of law contained in the literature distributed by the Union and in statements attributed to the Union's representatives does not constitute a misrepresentation so pervasive or a deception so artful as to affect employee free choice in the election.

Under the *Van Dorn* standard, the Sixth Circuit determines whether an alleged misrepresentation is objectionable by assessing the following factors: (1) the timing of the misrepresentation; (2) whether the other party had an opportunity to respond; (3) the nature and extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees were affected by the misrepresentation.[3] The court has held that the closeness of the election is an important consideration in evaluating the fifth factor.[4] In *Van Dorn*, however, the court emphasized that it agreed with the Board's holding in *Midland* that

[1] In its answer to the complaint and response to the Notice to Show Cause, the Respondent contends that "a majority of employees in the bargaining unit have rejected the Union." In support of this contention, the Respondent has offered in its response an exhibit that purports to be a letter dated February 12, 2001, from a group of unit employees to the Union. This letter states that a majority of the employees in the unit do not desire to be represented by the Union. Attached to this letter is an undated document that is alleged to be a petition signed by a majority of the unit disavowing the Union. The Respondent does not explain how it came into possession of the letter addressed to the Union, nor does it advance any basis for its assertion that the letter and petition were "previously provided to the Board." The Respondent claims that, in light of this letter and petition, it has a good-faith doubt concerning the Union's majority status, and that it has raised material factual issues requiring a hearing. We reject the Respondent's contentions. First, the Respondent does not claim, nor has it shown, that this alleged letter and petition constitute newly discovered or previously unavailable evidence. The letter is dated prior to the Regional Director's Report on Objections, the Respondent's exceptions to that report, and the Board's Decision and Certification of Representative. There is, however, no indication in the representation case record that the Respondent ever raised in the representation proceeding the matter addressed in the letter and petition. In any event, it is well established that, absent unusual circumstances, a union's majority status is *irrebuttably* presumed to continue during the year following the union's certification. *Ray Brooks v. NLRB*, 348 U.S. 96 (1954); and *Action Automotive*, 284 NLRB 251 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989). The alleged facts cited by the Respondent do not constitute unusual circumstances sufficient to require us to reexamine the Union's certification. See, e.g., *Parkview Manor*, 321 NLRB 477, 479 (1996). Accordingly, we find that the Respondent has not presented any material issue warranting a hearing.

[2] 736 F.2d 343 (6th Cir. 1984), cert. denied 469 U.S. 1208 (1985).

[3] *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996).

[4] *NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742, 747 (6th Cir. 1999).

"the Board should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made." 736 F.2d at 348. In *Van Dorn*, the court upheld the Board's finding that a flyer distributed by a union shortly before an election was not objectionable, even though the flyer contained misrepresentations concerning the wage rates employees of another company had received under a contract negotiated by the union. The court held that the flyer was not a forgery and that it was not presented to the employees in a manner so deceptive as to cause the employees to be "unable to separate truth from untruth."

Here, the misrepresentation at issue involves the Union's alleged statements to employees—both at union meetings and in a flyer distributed to employees—that under Board law the Respondent would be required to begin collective-bargaining negotiations at the employees' current level of wages and benefits, and that wages and benefits could only improve as a result of bargaining. In support of its contention that these statements warrant setting aside the election, the Respondent provided the Acting Regional Director with affidavits from six employees and its vice president of operations.

Only one of the employee affidavits alleged that the misrepresentation occurred at the meeting held on the day before the election; the other five employees stated that the Union made the misrepresentation at some time prior to the election. Further, the affidavit of the Respondent's vice president of operations stated that the Union's flyers on the subject were distributed at meetings held approximately 7 and 3 weeks before the election. Thus, the Respondent failed to present evidence that the statements were made at a time that did not provide it an adequate opportunity to respond to the misrepresentation. Instead, the evidence offered by the Respondent demonstrates that the misrepresentation was made well before the election.

In addition, it was clear that the Union was the source of the misrepresentation, as it was set forth in the flyer distributed by the Union and allegedly reiterated by union representatives in statements to employees. We find that the overt misrepresentations by the Union about wage negotiations are distinguishable from the misrepresentation in *St. Francis Healthcare Centre*,[5] where the Sixth Circuit, applying *Van Dorn*, found that the misrepresentation was not readily identifiable as union campaign propaganda and involved a pervasive and deceptive attack on the employer's overall credibility and its treatment of employees. As the court stated in *Mitchellace*, the fact that a union makes misrepresentations during an election campaign is not determinative of whether the election should be set aside, but rather, "pursuant to *Van Dorn*, we must look to the manner in which the representations were made." 90 F.3d at 1155. Here, the Union's misrepresentation was not communicated to the employees in a deceptive manner; instead, the misrepresentation took the form of a bare assertion about what the law purportedly required as the starting point for bargaining on wages and benefits. Therefore, we find that, even applying *Van Dorn* here, the Acting Regional Director properly overruled the Respondent's objection.[6]

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation with an office and place of business located in Brookfield, Ohio, has been engaged in the processing and slitting of steel.

Annually, in the course and conduct of its business, the Respondent purchases and receives products valued in excess of $50,000 directly from points located outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held February 5, 2001, the Union was certified on April 4, 2001, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[5] 212 F.3d 945 (6th Cir. 2000), denying enf. and remanding 325 NLRB 905 (1998). The Board's supplemental decision on remand is reported at 336 NLRB 678 (2001).

[6] Thus, we agree with the Acting Regional Director's finding that the situation here is similar to that in *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984), where the Board, applying *Midland*, held that a union business agent's statement that negotiations would start from employees' current salaries and increase from there was not an objectionable promise of benefits.

We acknowledge that the Respondent produced evidence that the misrepresentation was disseminated to a substantial number of the unit employees, and that this is a factor to be considered under *Van Dorn*, particularly as the Union prevailed in the election by 12 votes out of 80 cast in the balloting. We conclude, however, that these facts would not warrant setting the election aside even under an application of the five-factor test set forth in *Mitchellace*, supra.

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Brookfield, Ohio facility; excluding all office clerical employees, shipping clerical employees, and receiving clerical employees, and all professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since on about April 25, 2001, and thereafter, the Union, by fax, certified mail, and telephone, requested the Respondent to meet and bargain, and, since on about that same date, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after April 25, 2001, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, United Steel Service, Inc., d/b/a UNISERV, Brookfield, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Brookfield, Ohio facility; excluding all office clerical employees, shipping clerical employees, and receiving clerical employees, and all professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Brookfield, Ohio, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2001.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 15, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring.

I join my colleagues in finding that summary judgment is appropriate in this case. I did not participate in the underlying representation proceeding. It is unnecessary for me to express a view concerning the proper legal standard to be applied in considering whether misrepresentations made by a party in a Board election campaign warrant setting aside the election results. I agree with my colleagues that the Respondent has not raised any new matters warranting a hearing in this proceeding and that it is not entitled to relitigate issues previously raised by its objections in the representation proceeding.

Dated, Washington, D.C. September 15, 2003

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Region 2 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time production and maintenance employees employed by us at our Brookfield, Ohio facility; excluding all office clerical employees, shipping clerical employees, and receiving clerical employees, and all professional employees, guards, and supervisors as defined in the Act.

UNITED STEEL SERVICE, INC. D/B/A UNISERV